# Balan Subramaniam a/l Ponnudurai v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–28–02 OF 2012

BALIA YUSOF, TENGKU MAIMUN AND HAMID SULTAN JJCA

28 APRIL 2014

*Evidence — Dying declaration — Admissibility — Statement given under s 112 of the Criminal Procedure Code admitted as dying declaration under s 32(1)(a) of the Evidence Act 1950 — Whether relevancy determined admissibility — Whether statement gave greater probative force to evidence implicating accused — Whether Malaysian law did not require medical certificate to be produced for dying declaration to be admitted — Whether marking of identified document as exhibit matter for court to decide based on relevancy*

The High Court had found the appellant guilty of murdering his wife, Angeladevi, and a daughter, Anuradha, and of attempting to murder another daughter, Malini, by committing arson at their home one night. He was sentenced to death on the murder charges and to 12 years' jail on the attempted murder charge. The instant appeal was only against the conviction and sentence with regard to the case of Angeladevi and Malini. The trial court had admitted into evidence a dying declaration Angeladevi had made to a doctor when she was in hospital blaming the appellant for her injuries. The prosecution had also relied upon the evidence of neighbours who had heard a quarrel taking place at the appellant's house at the material time and they had seen the appellant's car being driven away from the premises. The prosecution had sought to rely upon Malini's evidence but when she turned hostile, the prosecution tendered Anuradha's statement, given to police under s 112 of the Criminal Procedure Code, to implicate the appellant. On the Court of Appeal's direction, the trial court marked that statement, which was initially marked only as an ID, as an exhibit and it was admitted under s 32(1)(a) of the Evidence Act 1950 ('Act') as a dying declaration because it related to the cause or circumstances of the transaction which resulted in her death and it also corroborated Angeladevi's dying declaration. In the instant appeal, the appellant took issue with the admission of Anuradha's dying declaration saying, inter alia, that there was no evidence to show Anuradha, who was seriously burnt, was in a fit and proper condition to have made that statement and that statutory requirements for the recording of the statement had also not been followed. It was submitted that the trial court should not have admitted the statement as an exhibit solely on the Court of Appeal's direction. The appellant

also contended that the charge of attempted murder could not be sustained after Malini's evidence was rejected as a result of her impeachment. A

**Held**, dismissing the appeal:

(1) The statements made by Angeladevi and Anuradha and the supporting evidence of the neighbours gave great probative force to the available evidence to attach culpability. The threshold for admissibility of a statement in the nature of a dying declaration under s 32(1)(a) of the Act was very low in contrast to a dying declaration at common law. The real issue was one of probative force. No reasonable tribunal, on proper appraisal of the facts, could say the statements made in the instant case could not be trustworthy and would not inspire confidence (see paras 18(iii) and 19). B C

(2) The argument that no medical certificate was produced to admit the dying declaration in reliance upon Indian cases was not part of Malaysian jurisprudence or law. India had some provisions to deal with such issues but in Malaysia, the Evidence Act 1950 was the sole guideline and the admissibility issue was related to s 32(1)(a) and nothing more. What was important in admitting or relying upon a dying declaration was that the court should be careful to ensure the statement was not fabricated or concocted, tutored or tailored, etc more so when conviction was going to be based on the dying declaration itself. The court had to ensure the statement, whether oral or reduced into writing, accurately represented what the deceased had said (see para 20). D E F

(3) The argument that the ID should not have been converted into an exhibit without the calling of the maker had no merit. In this case, the maker was present in court to testify when the document was marked as ID. It was for the court to decide whether it should be marked as exhibit, notwithstanding it might be hearsay, provided it was relevant under s 6 of the Evidence Act 1950 and/or other provisions of the Act (specifically s 136). The issue was whether it was relevant or whether it should be excluded under the 'fairness rule'. Relevant documents could be made admissible and be marked by the maker or through any person interested in the subject matter or by the court etc. When the maker was not available to test the veracity of the contents of the document, it might have less probative force (see paras 21, 22 & 24). G H

(4) There was no merit in the argument that since Malini's evidence was impeached the charge of her attempted murder must collapse as there was no lack of evidence in the instant case to identify the arsonist. The culpability of the appellant in causing injury to all the victims was not severable (see para 23). I

**[Bahasa Malaysia summary**

Mahkamah Tinggi mendapati perayu bersalah membunuh isterinya, Angeladevi, dan seorang anak perempuannya, Anuradha, dan cuba untuk membunuh anak perempuannya yang lain, Malini, dengan melakukan perbuatan membakar rumah di rumah mereka pada suatu malam. Dia dijatuhi hukuman mati atas tuduhan membunuh dan penjara 12 tahun atas tuduhan cubaan membunuh. Rayuan ini hanya terhadap sabitan dan hukuman yang berkaitan dengan kes Angeladevi dan Malini. Mahkamah perbicaraan telah menerima keterangan akuan nazak Angeladevi telah dibuat kepada doktor apabila dia berada di hospital menyalahkan perayu atas kecederaan pada dirinya. Pihak pendakwaan juga telah mengguna pakai keterangan jiran yang telah mendengar pertengkaran yang berlaku di rumah perayu pada masa tersebut dan mereka melihat kereta perayu yang dipandu keluar dari premis itu. Pihak pendakwaan telah meminta untuk bergantung kepada keterangan Malini tetapi apabila dia menjadi saksi belot, pendakwaan mengemukakan kenyataan Anuradha, yang diberikan kepada polis di bawah s 112 Kanun Tatacara Jenayah, untuk mengaitkan perayu. Atas arahan Mahkamah Rayuan, mahkamah perbicaraan menandakan kenyataan itu yang pada mulanya hanya ditandakan sebagai ID, sebagai ekshibit dan diterima masuk di bawah s 32(1)(a) Akta Keterangan 1950 ('Akta') sebagai akuan nazak kerana ia yang berkaitan dengan sebab atau hal keadaan transaksi yang menyebabkan kematiannya dan ia juga disokong akuan nazak Angeladevi. Dalam rayuan ini, perayu telah menimbulkan isu terhadap penerimaan akuan nazak Anuradha, antara lain, bahawa tidak ada bukti untuk menunjukkan Anuradha, yang mengalami kecederaan bakar yang serius, adalah dalam keadaan baik dan sepatutnya membuat kenyataan dan bahawa kehendak berkanun bagi rakaman kenyataan itu juga tidak dipatuhi. Perayu telah berhujah bahawa mahkamah perbicaraan itu tidak sepatutnya mengakui kenyataan itu sebagai satu-satunya ekshibit kepada arahan Mahkamah Rayuan. Perayu juga berhujah bahawa tuduhan cubaan membunuh tidak dapat dikekalkan selepas keterangan Malini telah ditolak akibat daripada dakwaannya.

**Diputuskan**, menolak rayuan:

(1) Kenyataan yang dibuat oleh Angeladevi dan Anuradha dan keterangan sokongan daripada jiran memberi kekuatan pembuktian yang kukuh untuk keterangan sedia ada yang terbaik untuk mengaitkan kebersalahan. Had bagi kebolehterimaan kenyataan dalam sifat akuan nazak di bawah s 32(1)(a) Akta adalah sangat rendah berbanding dengan suatu akuan nazak pada undang-undang biasa. Isu sebenar adalah kekuatan pembuktian yang kukuh. Tiada tribunal yang munasabah, pada penilaian betul fakta-fakta, boleh mengatakan kenyataan yang dibuat dalam kes tersebut tidak boleh dipercayai dan tidak akan membangkitkan keyakinan (lihat perenggan 18(iii) dan 19).

(2) Hujah bahawa tiada sijil perubatan telah dikemukakan untuk menerima

akuan nazak dalam pergantungan kepada kes-kes India bukanlah sebahagian daripada perundangan atau undang-undang Malaysia. India mempunyai beberapa peruntukan untuk menangani isu-isu itu tetapi di Malaysia, Akta Keterangan 1950 adalah garis panduan tunggal dan isu kebolehterimaan adalah berkaitan dengan s 32(1)(a) dan tiada lain. Apa yang penting dalam menerima atau mengguna pakai suatu akuan nazak adalah bahawa mahkamah perlu berhati-hati untuk memastikan pernyataan itu tidak direka atau dipalsukan, diajar atau disesuaikan, dan sebagainya, lebih-lebih lagi apabila sabitan akan berdasar kepada akuan nazak itu sendiri. Mahkamah perlu memastikan kenyataan itu, sama ada secara lisan atau dalam bentuk bertulis, dengan tepat mewakili apa yang dikatakan oleh si mati (lihat perenggan 20).

(3) Hujah bahawa ID yang tidak sepatutnya ditukar menjadi ekshibit tanpa memanggil pembuatnya tidak mempunyai merit. Dalam kes ini, pembuat hadir di mahkamah untuk memberi keterangan apabila dokumen itu ditandakan sebagai ID. Ia adalah untuk mahkamah untuk menentukan sama ada ia perlu ditanda sebagai ekshibit, walaupun ia mungkin dengar cakap, dengan syarat ia adalah berkaitan di bawah s 6 Akta dan/atau peruntukan lain dalam Akta (khususnya s 136). Isu yang berbangkit adalah sama ada ia berkaitan atau sama ada ia perlu dikecualikan di bawah 'fairness rule'. Dokumen yang berkaitan boleh diterima dan ditandakan oleh pembuat atau melalui mana-mana orang yang berkepentingan dalam hal perkara tersebut atau oleh mahkamah dan lain-lain. Apabila pembuat tidak ada untuk menguji kebenaran kandungan dokumen itu, ia mungkin kurang kekuatan pembuktian (lihat perenggan 21, 22 & 24).

(4) Tidak ada merit dalam hujah bahawa sejak bukti Malini telah dicabar tuduhan cubaan membunuhnya mesti terjejas kerana tidak ada kekurangan bukti dalam kes ini untuk mengenal pasti arsonist itu. Kebersalahan perayu dalam menyebabkan kecederaan kepada semua mangsa tidak boleh diketepikan (lihat perenggan 23).]

**Notes**

For cases on admissibility, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1582–1591.

**Cases referred to**

*Bandahala bin Undik v PP* [2014] 1 CLJ 708, CA (refd)
*Chin Kek Shen v PP* [2013] 5 MLJ 827, CA (refd)
*Liang Weng Heng v PP* [2013] 2 MLJ 855, CA (refd)
*Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, SC (folld)
*Naranjan Singh v PP* [1949] 1 MLJ 122 (refd)
*PP v Mohd Aszzid Abdullah* [2008] 1 MLJ 281, HC (refd)
*Rama Nand v State of Himachal Pradesh* AIR 1981 SC 7383, SC (refd)

A *Sunny Ang v PP* [1966] 2 MLJ 195, FC (refd)
*Tong Kam Yew & Anor v PP* [2013] 4 MLJ 888, CA (refd)

**Legislation referred to**

Criminal Procedure Code ss 112, 112(2), 402A
B Criminal Justice Act 1967 [UK] s 11
Evidence Act 1950 ss 6, 32(1)(a), 136
Penal Code s 307

**Appeal from:** Criminal Trial No 45–3 of 2005 and 45–5 of 2005 (High Court,
C Ipoh)

*Kumaraendran (Dev Kumaraendran with him) (Kumar & Co) for the appellant.*
*Mohamad Iskandar bin Ahmad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

D **Hamid Sultan JCA (delivering judgment of the court):**

**[1]** The appellant's appeal against the decision of the High Court for
E attempted murder of his daughter ('Malini') and the murder of his wife ('Angeladevi') by arson came up for hearing on 29 October 2013. The appellant was sentenced to 12 years imprisonment for attempted murder and the sentence of death was imposed for murder by the learned trial judge. Upon hearing the appeal, we dismissed it on the same day. My learned brother Balia
F Yusof JCA and my learned sister Tengku Maimun JCA have read the draft judgment and approved the same. This is our judgment.

PRELIMINARIES

G **[2]** It must be noted that the above case has a chequered history and had gone once to the Court of Appeal. The Court of Appeal had written grounds of judgment, in particular ordering a dying declaration to be admissible and impeaching the evidence of Malini, which was favourable to the accused. The judgment becomes important in this case as the appellant is taking the issue on
H the orders made.

**[3]** It must also be noted that notwithstanding the appellant having filed a lengthy petition of appeal, the learned counsel for the appellant had limited the submission to more on legal issues relating to prima facie case, dying
I declaration, s 112 statement, impeachment, alibi, *Radhi*'s direction, wrongfully adopting the evidence of the appellant in one of the cases which was jointly tried etc.

**[4]** The appellant was charged (a) for attempted murder of his daughter

Malini (45–03 of 2005), (b) for murder of his wife (45–04 of 2005), (c) murder of a daughter Anuradha (45–05 of 2005). A

**[5]** All the three charges were jointly tried. At the end of the prosecution case for the charge relating to Malini and Angeladevi, the appellant was acquitted and discharged. Defence for case relating to Anuradha was called and the appellant was convicted and sentenced to death for murder of Anuradha. The Court of Appeal had dismissed the appellant's appeal in respect of Anuradha. B

**[6]** The prosecution appealed in respect of Malini and Angeladevi and the Court of Appeal ordered defence to be called. The trial judge subsequently convicted the appellant in respect of Malini and Angeladevi. And in consequence, this appeal. C

**[7]** The charge in respect of Malini reads as follows: D

> Bahawa kamu pada 11 October 2004, di antara jam lebih kurang 10.00 malam sehingga 11.00 malam di sebuah rumah No 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan telah melakukan suatu perbuatan, iaitu menggunakan cecair pembakar iaitu petrol dan dalam keadaan sedemikian bahawa, jika dengan perbuatan itu, kamu telah menyebabkan kematian Malini a/p Balan Subaramaniam (KPT No 811217-08-6482), kamu boleh didapati bersalah melakukan kesalahan membunuh orang dan bahawa kamu telah menyebabkan kecederaan kepada Malini a/p Balan Subramaniam (KPT No 811217-08-6482). Dengan itu kamu telah melakukan salah kesalahan yang boleh dihukum di bawah Seksyen 307 Kanun Keseksaan. E F

**[8]** The charge in respect of Angeladevi reads as follows:

> Bahawa kamu pada 11 October 2004, di antara jam lebih kurang 10.00 malam sehingga 11.00 malam di sebuah rumah No 164, Desa Changkat (Indian Settlement), Batu Gajah, di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah membunuh Angeladevi a/p Raman (KPT No 570226-08-5516) dengan itu kamu telah melakukan salah kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan. G H

**[9]** The amended petition of appeal can be summarised as follows:

(a) the learned trial judge erred in law and fact by deciding that PW15, the prosecution witness had given a statement under s 112 of the Criminal Procedure Code and had admitted the statement and marked as P54; I

(b) the learned trial judge erred in law and fact by deciding that the appellant was at home on 11 October 2004 through the testimonies of PW2, PW5, PW6 and PW7 although all those witnesses did not see the appellant inside the house on the designated date and time;

(c) the learned trial judge erred in law and fact by deciding that PW7 heard the appellant's voice from inside the house quarrelling with his family when PW7 could not identify whose male voice it was;

(d) the learned trial judge erred in law and fact by failing to conclusively scrutinise that the circumstantial evidence in the murder charge against the appellant was insufficient and incomplete for the court to call the appellant to enter defence;

(e) the learned trial judge erred in law and fact by deciding that the cause of the fire to the house was petrol or kerosene even though PW12 and PW17 did not testify conclusively on this fact;

(f) the learned trial judge erred in law and fact by accepting the dying declaration of Anuradha a/p Balan Subramaniam which should not have been admitted in evidence;

(g) the learned trial judge erred in law and fact by failing to consider the appellant's defence that he was not at home on the specified date and time, and that defence was supported by his cautioned statement, exh D61;

(h) the learned trial judge erred in law and fact by dismissing the appellant's defence although supported by the evidence of PW15;

(i) the learned trial judge erred in law and fact by deciding that the defence that he was not at home at the material time amounted to defence of alibi the absence of notice under s 402A, could be used against the defence;

(j) the learned trial judge erred in law and fact on the burden of proof of the defence, after the prosecution case;

(k) the learned trial judge erred in law and fact by failing to adequately and dispassionately consider the defence case;

(l) the learned trial judge erred in law and fact when he wrongly convicted the appellant of the charge under s 307 of the Penal Code in case No 45–03 of 2005 despite the ruling of the Court of Appeal that the prosecution witness (PW15) had been impeached and as such her evidence cannot be used;

(m) the learned trial judge erred in law and fact when he took into consideration prejudicial and inadmissible evidence at the end of the defence case;

(n) the learned trial judge erred in law and fact when he did not evaluate the prosecution's evidence at the end of the defence's case;

(o) the learned trial judge erred in law and fact when he allowed the appellant to adopt the defence that he had given in case No 45–04 of 2005 as part of his defence in cases No 45–3 of 2005 and No 45–05 of 2005;

(p) the learned trial judge erred in law and fact when he did not hear the defence of the appellant in this case and therefore the trial is a nullity;

(q) in the Criminal Appeal No A-05–372 of 2010, the Court of Appeal had erred in law and fact by allowing the prosecution's appeal in setting aside the trial court's ruling in acquitting the appellant at the end of the prosecution's case in respect of cases No 45–3 of 2005 and No 45–05 of 2005 and held that the prosecution had made out a prima facie case in both cases thus ordering the appellant to enter defence on both charges;

(r) in the Criminal Appeal No A-05–372 of 2010, the Court of Appeal had erred in law and fact when they held that the dying declaration of Anuradha a/p Balan Subramaniam should have been admitted in evidence; and

(s) in the Criminal Appeal No A-05–372 of 2010, the Court of Appeal had erred in law and fact when the Court of Appeal did not consider adequately that the injuries of Anuradha a/p Balan Subramaniam was so severe that she could not have made the dying declaration and/or the said dying declaration does not inspire confidence for it to be admitted.

**[10]** The learned trial judge had meticulously dealt with the facts and the Court of Appeal had also set out the relevant facts in the judgment. We are of the considered view that judicial time should not be spent to regurgitate the facts save to deal with the core issues.

BRIEF FACTS

**[11]** The appellant is said to have committed the crime by arson. On the fatal day, a quarrel broke out in the house which led to the arson. The neighbours had heard the quarrel and also seen the appellant's car leaving the house. Subsequently, Angeladevi and Anuradha had given statements implicating the accused, and this is supported by circumstantial evidence of the neighbours.

**[12]** Angeladevi who was seriously injured had informed Dr Setow Hoo that the appellant was the cause of death. The learned judge had admitted the statement as dying declaration under s 32(1)(a) of the Evidence Act 1950 ('EA 1950').

**[13]** Anuradha had given a s 112 statement to the police and that was produced to be admitted under s 32(1)(a) of the EA 1950 but the court only marked it as ID60. Subsequently, the Court of Appeal had directed it to be marked as exh P60. The said statement reads as follows:

1. Pada 11 Oktober 2004 lebih kurang pukul 7.00 petang semasa ini saya berada di rumah bersama kakak saya nama Malini dan emak saya nama Angeladevi. Semasa ini kami semua berada di ruang tamu dan bapa saya balik dalam keadaan mabuk, marah-marah dan bising-bising mengeluarkan kata-kata kotor seperti kamu bukan anak-anak saya tetapi anak-anak anjing.

2. Lebih kurang pukul 8.00 malam 11 Oktober 2004 bapa saya balik semula ke rumah dan terus ke dapur melihat makanan. Tidak lama selepas itu bapa saya datang kepada saya yang sedang menonton televisyen di ruang tamu dengan nada marah menyatakan kepada saya hendak bakar emak saya.

3. Bapa saya berlalu sebentar dan apabila datang semula dalam masa tidak sampai 2 minit saya Nampak bapa saya ada memegang sehelai suratkhabar yang telah terbakar dan membuangnya dihujung kepala saya. Bapa saya juga sebenarnya semasa ini telah membawa satu jug aluminium saya syaki petrol berdasarkan baunya dan terus mencurahkan ke atas badan saya dan emak saya menyebabkan api daripada suratkhabar yang menyala tadi menyambar dengan cepat muka, bahu, tangan dan kaki saya. Manakala emak saya pula api menyambar seluruh badannya. Saya bersama emak saya terus berlari ke luar rumah dan diikuti oleh kakak saya juga dalam keadaan api membakar boleh dikatakan seluruh badannya. Jiran saya kemudiannya menghantar saya ke hospital Batu Gajah manakala emak dan kakak saya juga dihantar ke hospital Batu Gajah oleh jiran tetapi secara berasingan. Setelah itu kami dipindahkan unit rawatan lanjut ke Hospital Besar Ipoh.

4. Setelah membakar kami bertiga beliau terus keluar dengan motokarnya. Saya sendiri tidak tahu di mana beliau pergi atau berada sekarang.

**[14]** In allowing the appeal, the Court of Appeal, inter alia, had ruled that ID 60, the dying declaration of Anuradha should have been admitted as evidence and marked as an exhibit. It relates to the cause or circumstances of the transaction which resulted in her death. The Court of Appeal further held that the dying declaration of Anuradha clearly corroborates the dying declaration of Angeladevi which has been rightly admitted by the trial judge.

**[15]** Before us, the learned counsel for the appellant focused primarily on the issue of the admissibility of the dying declaration of Anuradha. We felt constraint to say that the learned counsel merely regurgitated the same issue which had been determined by the Court of Appeal in Rayuan Jenayah No A-05–280 Tahun 2010 heard together with Rayuan Jenayah No A-05–372 Tahun 2010. However, the learned counsel submitted that the appellant would be deprived of raising this issue should there be further appeal to the Federal Court depending on the outcome of this appeal.

**[16]** We obliged counsel's request and proceeded to hear submission on the dying declaration.

**[17]** The submissions of the learned counsel for the appellant can be summarised as follows:

(a) No prima facie case.

(b) The dying declaration in the form of s 112 statement is inadmissible. The manner it was made admissible has resulted in undue unfairness to the appellant for the following reasons:

(i) no mention was made by the prosecution at the opening address. The reason was the respondent was solely relying on the evidence of Malini (PW15) but when she become hostile then the prosecution put in Anuradha's statement. And relies on the case of *Public Prosecutor v Sa'ari Jusoh* [2007] 2 CLJ 197:

It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him.

(ii) Anuradha, being severely injured and under medication was not physically and mentally fit at the time of giving the statement. And relies on a number of cases to support the proposition namely:

(1) *Darshana Devi v State of Punjab* 1996 SCC (Cri) 38, where the Indian Supreme Court held that it cannot be believed that a person in such a critical condition with extensive burn injuries was mentally fit and made coherent statements.

(2) *Kaushalya v State* 1989 Cr LJ 157 where it was held that a person receiving severe burn injury may not be in a fit physical condition to make a dying declaration, particularly when sedative injections were administered to the person.

(iii) the recording officer of the s 112 statement failed to meet the requirements of recording a dying declaration. And says that:

(1) no evidence to state the declarant was fit to make the statement nor did he take any steps to satisfy himself;

(2) failed to record whether declarant could understand the Malay language;

(3) failed to ask whether she needs a Tamil interpreter; and

(4) time to complete the statement was not recorded and he said it was about 30 to 40 minutes.

(iv) The statement itself does not say the provisions of s 112(2) and 112(3) was satisfied. Section 112(2) of CPC says:

> 112.(2) Such person shall be bound to answer all questions relating to the case put to him by that officer:
>
> Provided that such person may refuse to answer any question

the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.

(3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.

(v) not all pages of the statement were signed by the declarant nor her thumb print taken. And relies on pp 11-27 of B B Panda law relating to dying declaration.

(vi) no medical certificate and/or the basic requirements in recording dying declaration were not complied with. And relies on a number of cases namely:

(1) *Maniram v State of Madhya Pradesh* AIR 1994 SC 840 where the Supreme Court of India held that:

... in a case of this nature, particularly when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration.

(2) *Kanchy Komuramma v State of Andra Pradesh* 1995 Supp (4) SCC 118, the Supreme Court of India had asserted that it was absolutely necessary to state in the statement that the declarant was mentally fit.

(3) *K Ramachandra Reddy v Public Prosecutor* AIR 1976 SC 1994, the Supreme Court of India had stated that the failure to state the declarant was in a fit state of mind is fatal.

(vii) the content of the dying declaration does not inspire confidence with regards to its veracity and on the contrary it raises reasonable suspicion. And relies on a number of cases to support the proposition namely:

(1) *Muhammed v State of Kerala* 2000(1) Crimes where the court was explicit in stating that a dying declaration must have such characteristic. The court stated that the dying declaration does not inspire confidence because the manner it was taken raises reasonable suspicion whereby it was not only lengthy but it was only done chronologically and there were abundant details that were not relevant to the offence.

(2) *Purna Padhi v State 70* (1990) CLT 308:

The elaborateness of this statement is by itself sufficient to cast doubt on the authenticity of this document. It is worth pointing out that no steps were taken by pw 19 either to press into service the help of a doctor to record the dying declaration or even to make him as a witness to the dying declaration.

(3) *Mohar Singh v State of Punjab* AIR 1981 SC 1581:

... In view of the detailed and extremely coherent nature of the dying declaration, we find it impossible to believe that the deceased even if conscious would have made such a detailed statement. We are, therefore, inclined to think that this statement smacks of concoction of fabrication in order to make the present case foolproof.

(viii) Anuradha's statement was not marked as exh P60 in accordance to the procedural requirement. The court had marked ID60 as P60 upon the direction of the Court of Appeal without calling the recording officer PW23 and/or investigation officer PW9, to formally mark it as an exhibit. And relies on the case of *Public Prosecutor v Dato' Balwant Singh (No 2)* [2003] 3 MLJ 395, where it was stated:

If necessary, a witness will be allowed to be recalled to give evidence under s 157 after the person sought to be corroborated has given his evidence (see *Nistarini v Nando Lai* 5 CWN xvi). In *Muthu Goundan v Chinniah* AIR 1937 M 86, corroborative evidence given before the giving of evidence sought to be corroborated, was ruled out. PW12 was not recalled to formally tender it in evidence after the accused had given evidence on it. The fact that the accused admitted having made exh. D43 and said that it is similar to his evidence does not thereby make it admissible.

(c) As Malini was impeached, the charge for attempted murder should not stand, as there will be no evidence to test the defence case. And relies on the case of *Public Prosecutor v Lo Ah Eng* [1965] 1 MLJ 241 where it was stated:

> … the content of that statement cannot become positive evidence; it is negative evidence in the sense that it can only be used to destroy or contradict the evidence which went before … The earlier statement cannot be substituted for the evidence in court which is disbelieved.

(d) Bare denial does not amount to an alibi defence. And relies on the case of *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91, where it was observed:

> In *R v Lewis*, the Court of Appeal of England held:
>
> (1) that the only evidence in support of an alibi to which s 11 of the Criminal Justice Act, 1967, applied was evidence relative to the whereabouts of the defendant at the time when the offence was alleged to have been committed: evidence relative to his whereabouts on another occasion was not subject to the restrictions of s 11 however significant the evidence might be to the issues in the case.
>
> (2) that any question arising for the purposes of s 11(8) as to the place or date at or on which the offence was alleged to have been committed had to be resolved on the committed charges and depositions available to the defendant at the end of the proceedings before the examining justices …

The principles elicited from the above decision may equally be applicable to s 402A of the Criminal Procedure Code. In my judgment s 402A is not applicable and notice required to be served thereunder need not be so served to render 'evidence in support of a defence of alibi' admissible

(i) where such evidence is in support of an alibi in respect of a day or time different from those specified in a charge; and

(ii) where a charge is amended in the course of the trial relating to either the date, time or place set out in the original charge.

Another English Court of Appeal case relevant to the issue is *R v Hassan*, wherein the Court of Appeal held:

... that the evidence sought to be adduced was not 'evidence in support of an alibi' within s 11(8) of the Criminal Justice Act 1967, because s 11 contemplated the commission of an offence at a particular place whereas the offence charged was not anchored to a particular location other than Cardiff and that, accordingly, s 11(1) did not apply and the evidence should not have been excluded.

A general principle may be deduced from the above case in relation to the applicability of s 402A of the Criminal Procedure Code and that is to say, where there is insufficient particularisation in the charge regarding the place where the offence is alleged to have been committed, s 402A shall not apply.

Needless to say that an accused shall not be disallowed to state in evidence that a prosecution witness had made a mistake in identifying him as the person who attacked him on the ground that the accused, on the relevant date and time as specified in the charge, was somewhere else other than the place where the alleged offence was committed. Such evidence may be regarded as a total denial of the charge and not 'evidence in support of an alibi' within the meaning of s 402A of the Criminal Procedure Code. *I am of the view that s 402A only applies when the accused proposes to call other person or persons as witness or witnesses to support such evidence.* (Emphasis added.)

And also relies on (i) *Vasan Singh v Public Prosecutor* [1988] 3 MLJ 412; (ii) *Ng Thian Soons v Public Prosecutor* [1990] 2 MLJ 148.

(e) There was a failure by the judge to evaluate the case as a whole. And relies on the case of *Jaafar bin Ali v Public Prosecutor* [1998] 4 MLJ 406:

At the close of the case for the defence and submissions, the court must review the evidence adduced with regard to all the elements to be proved and then decide whether the prosecution has proved the case against the accused beyond reasonable doubt... Failure to comply with these mandatory requirements would amount to a misdirection on the burden of proof which is not curable.

(f) judge erred when he allowed the accused to adopt the defence in case No 45-04-2005. In consequence it is in breach of s 181 CPC which leads to nullity.

**[18]** We have read the appeal record and the submissions of the parties in

detail. We are grateful to the learned counsel for the comprehensive submissions. After much consideration to the submission of the learned counsel for the appellant, we are of the considered view the appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) in the instant case, the jurisprudence relating to dying declaration and s 32(1)(a) of the EA 1950 forms the substantive evidence to drive home the charges. In addition, the supporting evidence of the neighbours gives greater probative force to the statements;

(b) it is well established that the recovery of the dead body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim, (see *Rama Nand v State of Himachal Pradesh* AIR 1981 SC 738). In addition, even if the body is not recovered, pure circumstantial evidence itself is sufficient to sustain a charge of murder, (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195); and

(c) The threshold for admissibility of statement in the nature of dying declaration under s 32(1)(a) is very low in contrast to dying declaration at common law. The real issue is one of probative force (see *Bandahala bin Undik v Public Prosecutor* [2014] 1 CLJ 708).

**[19]** In the instant case, the statement by Angeladevi as well as Anuradha inclusive of the evidence of the neighbours give a greater probative force to the evidence to attach culpability. The prosecution case does not solely depend on a statement as the cases cited by the learned counsel for the appellant shows. No reasonable tribunal, on proper appraisal of the facts of the case will say the statements made in the instant case cannot be trustworthy and will not inspire confidence. In addition, the cases cited by the learned counsel for the appellant can be distinguished from the facts of the instant case and we are of the considered view that judicial time ought not be spent on explaining issues which are not relevant to the subject matter of the facts of this case.

**[20]** The learned counsel's argument that no medical certificate was produced to admit dying declaration in reliance of Indian cases is not part of our jurisprudence or law. India has some provisions to deal with such issues but in our jurisprudence, the EA 1950 is the sole guideline, and the admissibility issue is related to s 32(1)(a) and nothing more. What is important in admitting or relying on dying declaration is that the court must be careful to ensure that the statement is not fabricated or concocted, tutored or tailored etc; more so when conviction is going to be based on the dying declaration itself. Further, the court must ensure that the statement, whether oral or reduced into writing must accurately represent what the deceased has said (see *Naranjan Singh v Public Prosecutor* [1949] 1 MLJ 122).

**[21]** The learned counsel's submission that ID60 should not have been

converted to P60 without calling the maker has no merits. In the instant case the maker was present in court to give evidence when it was marked as ID60. The law of evidence does not place much emphasis on the label but it deals only with the substance and it is for the court to decide whether it should be marked as exhibit notwithstanding it may be hearsay provided it is relevant under s 6 of the EA 1950 and/or other provisions of the Act. The issue will be are of relevance or should it be excluded under the 'fairness rule'. (see *Liang Weng Heng v Public Prosecutor* [2013] 2 MLJ 855).

**[22]** This issue is specifically covered by s 136 and the Court of Appeal has directed that piece of evidence to be tendered as exhibit. We do not find merit in the appellant's complaint. Section 136 of the EA 1950 reads as follows:

> 136(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.
>
> (2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.
>
> (3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

We have also gone through other technical issues which the learned counsel has raised and on the factual matrix of the case, we are of the considered view that it has no merits.

**[23]** We also do not find merit in the appellant's argument that since Malini's evidence was impeached, the charge of attempted murder must collapse. In the instant case, there is no lack of evidence to identify the arsonist, and in consequence, the culpability of the appellant is not severable in causing the injury to all the victims.

**[24]** It is well settled that relevant documents can be made admissible and be marked by the maker or through any person interested in the subject matter or by the court etc. When the maker is not available to test the veracity of its contents, at times, it may have less probative force.

**[25]** We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the

maximum evaluation and beyond reasonable doubt test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

**[26]** We are of the considered view it is a safe decision and appellate intervention is not warranted and the appeal has no merit. Accordingly we dismiss the appeal.

We hereby order so.

*Appeal dismissed.*

Reported by Ashok Kumar